FILE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1959

No. [redacted] 47

ERNEST DOSSY YANCY, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 25, 1958
CERTIORARI GRANTED MARCH 23, 1959

Supreme Court of the United States

OCTOBER TERM, [redacted]

No. [redacted]

ERNEST DOSSY YANCY, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

[fol. 3]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

(File Endorsement Omitted)

Information No. 34315

Vio: Sec. 2553(a), Title 26, USC
(Unlawful purchase and sale of narcotics)

UNITED STATES OF AMERICA, PLAINTIFF

v.

ERNEST DOSSY YANCY, DEFENDANT

INFORMATION—Filed May 18, 1954

THE UNITED STATES ATTORNEY CHARGES:

That on or about May 12, 1954, in the Eastern District of Michigan, Southern Division, ERNEST DOSSY YANCY unlawfully and knowingly purchased a quantity of narcotics, to wit: approximately four hundred (400) grains of heroin, not in or from the original stamped package and not having on it the appropriate tax-paid United States Internal Revenue stamps, as required by law; in violation of Section 2553(a), Title 26, USC.

COUNT TWO:

The United States Attorney further charges that on or about May 12, 1954, in the Eastern District of Michigan, Southern Division, ERNEST DOSSY YANCY did unlawfully and knowingly sell, dispense and distribute to a special employee of the U. S. Bureau of Narcotics approximately four hundred (400) grains of heroin, which said heroin was sold, dispensed and distributed not in or from the original stamped package and not having on

it the appropriate tax-paid United States Internal Revenue stamps, as required by law; in violation of Section 2553(a), Title 26, USC.

COUNT THREE:

The United States Attorney further charges that on or about May 17, 1954 in the Eastern District of Michigan, [fol. 4] Southern Division, ERNEST DOSSY YANCY unlawfully and knowingly purchased a quantity of narcotics, to wit: approximately seven hundred seventy-five (775) grains of heroin, not in or from the original stamped package and not having on it the appropriate tax-paid United States Internal Revenue stamps, as required by law; in violation of Section 2553(a), Title 26, USC.

COUNT FOUR:

The United States Attorney further charges that on or about May 17, 1954, in the Eastern District of Michigan, Southern Division, ERNEST DOSSY YANCY did unlawfully and knowingly sell, dispense and distribute to a special employee of the U. S. Bureau of Narcotics approximately seven hundred seventy-five (775) grains of heroin, which said heroin was sold, dispensed and distributed not in or from the original stamped package and not having on it the appropriate tax-paid United States Internal Revenue stamps, as required by law; in violation of Section 2553(a), Title 26, USC.

FRED W. KAESS
United States Attorney

/s/ George E. Woods
GEORGE E. WOODS
Assistant U. S. Attorney

[fol. 5] IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

(Title Omitted)

WAIVER OF INDICTMENT—May 18, 1954

I, ERNEST DOSSY YANCY, the above named defendant, being accused of violating Sec. 2553(a), Title 26, USC (Unlawful sale and purchase of narcotics) and being advised of the nature of the charge and of my riglits, do hereby waive in open court prosecution by indictment and do consent that the proceedings may be by information instead of by indictment.

/s/ Ernest Dossy Yancy
Defendant

/s/ G. Woods
Witness

Dated: May 18, 1954

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[fol. 20] IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

(File Endorsement Omitted)

No. 34315

(Title Omitted)

At a session of said court held in the Federal Building, Detroit, Michigan on August 31, 1954

Present: HONORABLE STEPHEN S. CHANDLER, JR.
United States District Judge

JURY VERDICT—August 31, 1954

The Defendant, ERNEST DOSSY YANCY, being present in Court and the jury heretofore empaneled being again in

Court, and having heard the testimony of witnesses, the proofs and arguments of counsel and charge of the Court, retire from the Bar thereof under charge of the officer duly sworn for that purpose to consider their verdict; and after being absent for a time come into Court again and in the presence of the defendant, say upon their oaths that they find said defendant, ERNEST DOSSY YANCY, guilty as charged in the Information heretofore filed against him as to counts 3 and 4.

The disposition of Counts 1 and 2 is being held in abeyance by the United States Attorney until the time of sentence.

The date of the sentence is set for Thursday, September 2, 1954, at 9:30 a.m. in the forenoon and the matter referred to the Chief Probation Officer of this Court for pre-sentence investigation and report, and the appearance bond of the defendant is continued in full force and effect.

/s/ Stephen S. Chandler, Jr.
United States District Judge
District of Oklahoma

[fol. 21] IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

(File Endorsement Omitted)

No. 34315

UNITED STATES OF AMERICA

v.

ERNEST DOSSY YANCY

JUDGMENT—September 2, 1954

On this 2nd day of September, A.D., 1954 came the attorney for the government and the defendant appeared in person and[1] with his counsel, William T. Patrick,

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] Not Guilty and Verdict of Guilty of the offense of violating Section 2553(a), Title 26, U.S.C. (Unlawful purchase and sale of narcotics) as charged[3] in the Counts 3 and 4 of the Information, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

representative for imprisonment for a period of [4] five years (5 years) as to Count 3 and five (5) years as to Count 4, the sentence of Count 4 to run consecutively to Count 3, making a total of ten (10) years.

IT IS FURTHER ORDERED that the Defendant pay to the United States of America a fine of One Dollar ($1.00) on Count 3 and One Dollar ($1.00) on Count 4.

IT IS FURTHER ORDERED that Counts 1 and 2 of the Information be and they are hereby dismissed on Motion of the Assistant United States Attorney.

IT IS ADJUDGED that [5] bond be and it hereby is cancelled.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Stephen S. Chandler, Jr.,
United States District Judge.

The Court recommends commitment to: [6]

.....,
Clerk.

[fols. 22-24] . . .

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[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

[6] For use of Court wishing to recommend a particular institution.

[fol. 22a] RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on September 2nd, 1954 to Wayne County Jail Detroit, Mich.

Defendant noted appeal on

Defendant released on

Defendant elected, on not to commence service of the sentence.

Defendant's appeal determined on

Defendant delivered on September 8, 1954 to Federal Correctional Institution at Milan, Michigan (pending transfer to, the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

WILLIAM A. NOWICKI
United States Marshal.

By Kenneth W. Lewis
Deputy.

[fol. 25] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

(Title Omitted).

PETITION TO VACATE ILLEGAL SENTENCE—
Filed November 26, 1956

The petition of Ernest Dossy Yancy, defendant aforestated, as petitioner, brought under authority of 28 U.S.C.A. 2255, alleges as follows:

1.

That petitioner is in the custody of the Attorney General of the United States, now confined at the United States Penitentiary, Atlanta, Georgia.

2.

That an information was filed by the United States Attorney, Eastern District of Michigan, alleging violations of the Narcotic Law, four (4) counts, counts 1 and 2 being subsequently dismissed. That count 3 of information No. 34315 charged a violation of 26 U.S.C.A. 2553(a), more specifically the purchase of heroin in unstamped package, and count 4 of same information charge a violation of 26 U.S.C.A. 2553(a), more specifically the sale of heroin in unstamped package.

[fol. 26]

3.

That on May 18, 1954, petitioner appeared before this Honorable Court, with attorney present, and waived indictment. Counsel appeared to stand mute and petitioner was ignorant of the law and his right to a grand jury presentment. A plea of not guilty was entered to the information filed. On August 4, 1954, petitioner asked permission of the court to change counsel and this was done.

4.

That on August 31, 1954 petitioner was found guilty on count 3 and count 4 of information No. 34315.

5.

That on September 2, 1954 petitioner was sentenced in this court to a term of five (5) years on count 3, and a term of five (5) years on count 4, the sentence imposed on count 4 to be served consecutively to that imposed on count 3, an aggregate total of ten (10) years.

6.

That the sentences imposed on count 3 and count 4, to be served consecutive one to the other are illegal as such, being therefore one sentence or the other double punishment. That the maximum provided by law for violation of 26 U.S.C.A. 2553(a) being five (5) years, sentences imposed on counts 3 and 4 of five (5) years each must be served concurrent with each other to avoid double punishment.

7.

That the court erred in imposing sentence on count 4 of five (5) years consecutive to sentence imposed on count 3 of five (5) years, being in violation of the Fifth Amendment in that the same essential elements and proof thereto existed in each count under the same title and section and at the same time, as will appear herein:

[fol. 27]

FACTS

Count 3 of information No. 34315 alleged that, on May 17, 1954, petitioner purchased 775 grains of heroin in an unstamped package, the vendor not being named. Count 4 of information No. 34315 alleged, that on May 17, 1954, petitioner sold 775 grains of heroin in an unstamped package, the buyer not being named.

The elements in the two counts are identical: (a) The time or date of each alleged transaction, (b) The quantity of 775 grains, (c) That it was heroin, and (d) That it was an unstamped package. The statute concerned, 26 U.S.C. 2553(a), is inclusive as to violation, i.e., to buy, sell, or conceal, any or each, as to narcotics imported without payment of tax, etc.

Whether the alleged violation was either to buy, or to sell, each of the elements noted as (a), (b), (c) and (d)

above are essential as proof to either violation. The act of buying, or selling, is of itself nothing excepting the essential elements exist, are so named and so proven. Therefore, a conviction on count 3 is a defense against a conviction on count 4 of the same identical title and section, the essential elements and proof of one being also the same for the other.

Where double jeopardy is apparent by conviction on count (4) following conviction on count 3, imposition of consecutive sentence on count 4 is plainly that of double punishment. Had the respective sentences been imposed as concurrent with each other, the question and attack would lie moot.

ARGUMENT AND AUTHORITIES

In *Copperthwaite, Et Al* v. *U. S.*, #5415, C.C.A. 6, (37 F. 2d 846) where defendants were charged under Title 26 U.S.C. and under Title 21 U.S.C. for purchase and sale separately, receiving consecutive sentences, the court ruled "Double Punishment," stating: "Identity as to [fol. 28] double punishment as well as to double jeopardy, is shown if the same evidence necessary to prove either offense will also necessarily establish the other and this relation is reciprocal." (The question argued was: Can either be shown without disclosing the other?). In support the court cited *Reynolds* v. *U. S.* (C.C.A. 6, 280 F. 1, 2), and *Miller* v. *U. S.* (C.C.A 6, 300 F 2d, 529, 534) wherein the latter court (citing *Reynolds* v. *U. S.*, Supra) ruled that separate counts of possession and sale, within a short period of time, same material, was only one act, not two.

Citing as controlling authority the opinion expressed by Mr. Justice Jackson in *Krulewitch* v. *U. S.* (69 S. Ct. 716-725) the court set aside a consecutive sentence, where conspiracy and substantive counts contained the same elements, in *Freeman* v. *U. S.* (6 C.C., 146 F. 2d 978, 979, 1945), ruling: "Whenever it appears that the proof of one offense proves every essential element of another growing out of the same act, the Fifth Amendment limits the punishment to a single act."

Where one substantive is incidental to another charged, it cannot be charged as it is double punishment. *Schroeder* v. *U. S.*, (C.C.A. 2), 7 F. 2d 606.

In *Smithken* v. *U. S.* (265 Fed. 489), the court ruled: "If two indictments or two counts of one indictment are the same elements for elements in necessary allegations and proof, *then the charges are but one offense* and the defendant *cannot be tried for separate offenses*". (Emphasis by Petitioner).

See also: *Dimenza* v. *U. S.* (9 Cir.) 130 F. 2d 465; *Holbrook* v. *U. S.* (8 Cir.) 136 F. 2d 649; *Hewitt* v. *U. S.* (8 Cir.) 110 F. 2d 1; *Wells* v. *U. S.* (5 Cir.) 124 F. 2d 818; *Holiday* v. *U. S.* (8 Cir.) 130 F. 2d 988.

An early precedent was established, the analogy to petitioner's case made plain, by the court in *Re Neilsen* (131 U. S. 176, 9 S. Ct. 672, 33 L. Ed. 118) where, reversing, they ruled: ". . . . . crime which has various incidents in it, he cannot be tried a second time . . . . . [fol. 29] for one of those incidents." This decision was used as the controlling authority by courts reversing in *Reynolds* v. *U. S.*, supra; *Morgan* v. *U. S.* (C.C.A.) 294 F. 82; and *Rutkowski* v. *U. S.*, 149 F. 2d 481, all cases being analagous to your petitioner's.

If the same evidence will support a verdict of conviction on both offenses, a prosecution for one will bar prosecution for the other: *U. S.* v. *De Angelo*, 138 F. 2d 466; *U. S.* v. *Carlisi*, D. C. Ed. N.Y., 32 F. Supp. 479, 482; *Chiarella-Stancin* v. *U. S.* (2 C.C.), 187 F. 2d 12; *Ghadioli* v. *U. S.* (C.C.A.) 17 F. 2d 236; *Fitzpatrick* v. *U .S.*, 87 F. 2d 471, 472.

From another viewpoint, bearing in mind the severity of a sentence of ten (10) years, as petitioner received for two (2) counts charging separate offenses under a single statute and section, (the which provides a maximum of five (5) years only), alleged to have occurred on the *same date*, the *same ingredients and elements*, this court's attention is called to the case of *Amendola* v. *U. S.* (C.C.A. N.Y. 1927, 17 F. 2d 529). That case concerned itself with four counts stemming from a single sale of heroin, and consecutive sentences were imposed on the four counts to an aggregate of ten years. The court reversed and remanded, Justice Learned Hand

ruling: "It is true that the defendant was an old offender. . . . . This did, indeed, make him subject to the maximum penalty; but it did not in our view justify swelling a single offense into two separate offenses by the mere contrivance of charging it in different ways." Other cases relating to severity of sentence, that is, due to consecutive sentences imposed on related or continuous crimes charged in separate counts, are: *Harrison* v. *U. S.* (C.C.A., 7 F. 2d 259); *Hartson* v. *U. S.* (C.C.A. 14 F. 2d 561); *Nash* v. *U. S.*, 54 F. 2d 1006-C.C.A. 2); and *Weems* v. *U. S.* (217 U. S. 349, 366, 367, 30 S. Ct. 544, 548, 54 L. Ed. 793) as cited in *Beckett* v. *U. S.*, (84 F. 2d 731).

Petitioner invites the court's attention to a most recent analogy, where decision, vacation and remand for new sentence following motion occurred in the lower [fol. 30] court, Southern District of New York. The case is *Rolon* v. *U. S.*, Cr. No. 133-8, order vacating and remand for new sentence by Judge Ryan was on April 26, 1956. Petitioner in this case was sentenced on count 1 charging possession, count 2 charging sale, and count 3 charging conspiracy with others. The three sentences were consecutive. Judge Ryan vacated sentence on counts 1 and 2, ruling: ". . . . There was no possession save that incident to sale. Cumulative sentences under counts 1 and 2 were therefore improperly imposed" and cited *U. S.* v. *Chiarella*, 187 F. 2d 12 (C.A. 2, 1951), *Amendola* v. *U. S.*, supra, and *Schroeder* v. *U. S.*, supra.

In drawing an analogy between the above case and your petitioner's, the first being "possession" and "sale," the latter being "purchase" and "sale," but in both instances *the same material* (heroin) was the prime element. Examination of the trial transcript will show that "purchase" was based on presumption to convict since heroin is not produced in this country, nor could petitioner ever obtain same other than by purchase. Therefore, "purchase" is synonymous with "possession," and that which petitioner was charged with *purchasing* on May 17, 1954 (775 grains of heroin in an unstamped package), was same, and all same (775 grains of heroin in an unstamped package), which petitioner was charged with *selling* on May 17, 1954.

Judge Gourley, Chief Judge of Western District of Pennsylvania, reduced sentence, following petition under 28 U.S.C. 2255, in case of *Prince* v. *U. S.*, Cr. No's. 14041, 14051, and 14056, on July 1, 1954, where a parallel may well be noted between that case and instant petition. Prince was charged under 26 U.S.C. 2553, and 2554, and 21 U.S.C. 173-174, in four counts of sales made on August 8, August 22, August 31, and September 5, 1953. On the four counts, prince was imposed consecutive sentences aggregating eleven (11) years. Judge Gourley reduced these sentences to an aggregate of five (5) years, stating primarily the reason was because the period covered represented a continuous course of conduct (sales) of *not more than 30 days.*

[fol. 31] Your petitioner's alleged course of conduct (i.e., purchase, and sale, of the *same identical material*, no more nor less) was at one point in time, on May 17, 1954.

Judge Gourley (in *Prince* v. *U. S.*, supra) expressed himself further: "Since the defendant . . . . . was a first offender under the Federal law, I am compelled to conclude that the sentence imposed is excessive and unreasonably burdensome. The Act (Public Law 255) under which sentence was imposed, as far as penal punishment is concerned, provides a sentence of not less than two nor more than five years for a first offender . . ."

Your petitioner is a first offender under the Federal law, yet he was imposed an aggregate sentence equaling that mandatory as maximum for a second offender under the law of that date. Your petitioner was imposed a sentence of five (5) years which was consecutive to a sentence of five (5) years on the first count from which the second count stemmed. The same date, the same identical elements necessary to prove one proved the other.

Your petitioner realizes that the last two cases cited above (*Rolon* v. *U. S.*, and *U. S.* v. *Prince*) are not binding as precedents on this Honorable Court, being themselves decisions made in the interest of Justice by the same trial court which imposed sentence. However, your petitioner believes this Honorable Court will give them due credence, analogous to the degree they may be, in hearing instant motion.

The court, in *Gargano* v. *U. S.* (C.C.A. Cal. 1944, 140 F. 2d 118) ruled: "District Court (had) jurisdiction to entertain motion . . . . . to set aside judgment on ground that it imposed two sentences for a single offense."

Petitioner prays this Honorable Court to entertain instant motion, set date for hearing, notify respondent and order production of petitioner to give testimony as may be necessary in support of allegations. (*U. S.* v. *Hayman*, Cal. 1952, 72 S. Crt. 263, 342 U. S. 205, 96 L. Ed.; *Clark* [vol. 32] v. *U. S.*, C.A. Ind. 1952, 194 F. 2d 528; *Cherrie* v. *U. S.*, C.A. Wyo., 1949, 179 F 2d 94; *Slack* v. *U. S.*, C.A. Tenn 1952, 196 F. 2d 493).

Petitioner further prays the court to vacate sentence of five (5) years on either of the two counts, the which one or the other constitute double punishment; or to correct such sentence as to impose the five (5) years on one count to be served *concurrent* with the five (5) years imposed on the other by issuance of a nunc pro tunc ordered. (See *Foster* v. *Zerbst*, 92 F. 2d 950).

Dated:

/s/ Ernest Dossy Yancy
Petitioner-Defendant

Subscribed and sworn to before me, a Notary Public, this 19 day of November, 1956.

/s/ John O. Boone
Notary Public
Parole Officer: Authorized by the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).

[fol. 33] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

(File Endorsement Omitted)

No. 34315

(Title Omitted)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

&

ORDER OVERRULING MOTION TO CORRECT SENTENCE—
December 14, 1956

FINDINGS OF FACT

1. That Petitioner has filed a Motion to correct an illegal sentence and conviction under Section 2255, Title 28, USC, Rule 35 of the Federal Rules of Criminal Procedure, Section 3572 of Title 18, USC.

2. That a four-count Information was filed against the defendant on May 18, 1954.

3. That the defendant was arraigned before the court on May 18, 1954, at which time the United States attorney was granted authority to file the Information.

4. At the time of this arraignment, the defendant was represented by competent counsel, Herbert Harris, of Detroit, Michigan.

5. That the defendant in open court, in the presence of his counsel, was advised of his Constitutional rights and the charges which were preferred against him.

6. That the defendant and his counsel waived the filing of an Indictment and consented to the filing of the Information.

[fol. 34] 7. That defendant subsequently changed counsel and on *August 31, 1954*, proceeded to trial, at which time he was found guilty on Count 3, which charged the purchase of 775 grains of heroin which were not in the original stamped package, and on Count 4 which charged the sale of 775 grains of heroin on the same date to a special employee of the Narcotics Bureau.

8. On September 2, 1954, the defendant was sentenced to five years on Count 3 and five years on Count 4, said sentence on Count 4 to run consecutively with the sentence on Count 3, the aggregate total of said sentence being ten years. Counts 1 and 2 were dismissed on motion of the United States attorney.

CONCLUSIONS OF LAW

1. This Court has jurisdiction to entertain this Motion under Section 3572 of Title 18 and Section 2255, Title 28, of the United States Code, and Rule 35 of the Federal Rules of Criminal Procedure.

2. The defendant's claim that the Court erred in permitting the defendant to proceed to trial under an Information, in violation of his Constitutional rights, is without merit. *Rule 7 of the Federal Rules of Criminal Procedure*;

Gill v. *U.S.A.*
55 Fed. 2d 399 (1930)

Patton v. *U.S.A.*
281 U.S. 276—50 S. Crt. 253
74 L. Ed. 854, 70 ALR 263

Barkman v. *Sanford*
162 Fed. 2d 592
332 U.S. 816 (364)

McKenney v. *U.S.A.*
172 Fed. 2d 781

[fol. 35] 3. The defendant's claim that the Court erred in sentencing him to consecutive sentences on Counts 3 and 4, in violation of his Constitutional rights for the reason that the two counts constitute one continuous act, is without merit.

It is an established rule of law that where an offense, or offenses, occur which violate two or more sections of a statute the test to be applied in determining the question of identity of offenses charged is whether each requires proof of fact which is not required by the other.

Here proof of purchase was required to convict under Count 3; while proof of sale was required to warrant

conviction under the fourth count. When considering these elements, it is evident that the two counts did not charge offenses growing out of a single continuous transaction. The mere fact that the same quantity and same date is involved is of no consequence if each offense charged is separate unto itself.

"There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction."

It is further held that the Court has within its discretion the right to impose two or more sentences on separate counts in an Indictment or Information and have them run consecutively.

Blockburger v. *U.S.A.*
284 U.S. 299

Gavieres v. *U.S.A.*
220 U.S. 338

Albrecht et al v. *U.S.A.*
273 U.S. 1 (1927)

Burton v. *U.S.A.*
202 U.S. 344

[fol. 36] *Allston* v. *U.S.A.*
47 S. Crt. 634
274 U.S. 289
71 L. Ed. 1052

Mills v. *Aderhold, Warden*
110 Fed. 2d 765

Reger v. *Hudspeth*
103 Fed. 2d 825

It therefore follows that the Motion should be overruled.

/s/ Arthur F. Lederle
Chief Judge

Dated: December 14, 1956.

[fol. 37] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 34315

(Title Omitted)

At a session of said Court held in the Federal Building, Detroit, Michigan, on December 14, 1956.

Present: Honorable Arthur F. Lederle
Chief Judge

Order Overruling Motion to Correct Sentence—
December 14, 1956

In accordance with the Findings of Fact and Conclusions of Law heretofore filed on this date,

It Is Hereby Ordered that defendant's motion to correct or set aside the sentence heretofore imposed in this cause shall be and it hereby is overruled.

/s/ Arthur F. Lederle
Chief Judge

[fol. 38] PROOF OF MAILING
(Omitted in Printing)

[fols. 39-43] • • •

[fol. 44] (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 34315

(Title Omitted)

MEMORANDUM AND ORDER VACATING FINDINGS OF FACT AND ORDER ENTERED DECEMBER 14, 1956, AND REENTERING SAID FINDINGS OF FACT AND ORDER AS OF THIS DATE—March 29, 1957

In this cause the Court entered an order on the 14th day of December, 1956, overruling a motion filed on November 26, 1956, to correct the sentence imposed on the defendant-petitioner by the Honorable STEPHEN S. CHANDLER sitting by special designation from the Western District of Oklahoma on September 2, 1954.

On the 25th day of February, 1957, it was brought to the attention of this Court by the defendant-petitioner, ERNEST DOSSY YANCY, that he had not received any notice from the Court that his motion had been decided upon and the time for appeal had subsequently run.

An examination of the Court's file reveals that copies of the order were sent to George E. Woods, Assistant United States Attorney, and William T. Patrick, counsel of record, at the time of trial of the defendant-petitioner. The defendant-petitioner does not appear on the Proof of Service.

The Court believing the statement of defendant-petitioner that he failed to receive notice of the entry of the order dated December 14, 1956, has been taken in good faith and provisions having been made in Rules 37(2)(a), 45(b)(2) and 49(c) of the Federal Rules of Criminal Procedure for this type of occurrence, and in accordance with the opinion of the United States Supreme Court in HILL v. HAWES, 320 U.S. 520, and REMINE v. U.S., 161 F. 2d 1020, and 331 U.S. 862,

[fol. 45] It Is Hereby Ordered that the Findings of Fact and Conclusions of Law, and order heretofore entered on December 14, 1956 be and they hereby are set aside and vacated.

It Is Further Ordered that the Findings of Fact and Conclusions of Law and Judgment identical to those Findings of Fact and Conclusions of Law and Order entered on December 14, 1957 are herewith being filed.

It Is Further Ordered that the defendant-petitioner is hereby denied leave to appeal in forma pauperis.

/s/ Arthur F. Lederle
Chief Judge

DATED: March 29, 1957

[fols. 46-49] • • •

[fol. 50] . . . .

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 34315

(Title Omitted)

At a session of said Court held in the Federal Building, Detroit, Michigan on March 29, 1957.

Present: Honorable Arthur F. Lederle
Chief Judge

Order Overruling Motion to Correct Sentence—March 29, 1957

In accordance with the Findings of Fact and Conclusions of Law heretofore filed on this date,

It Is Hereby Ordered that defendant's motion to correct or set aside the sentence heretofore imposed in this cause shall be and it hereby is overruled.

/s/ Arthur F. Lederle
Chief Judge

[fol. 51] PROOF OF MAILING
(Omitted in Printing)

[fols. 52-53] . . .

[fol. 54] (File Endorsement Omitted)

No. 13307

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ERNEST DOSSY YANCY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Eastern District of Michigan

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OPINION—Decided February 28, 1958

Before SIMONS, Chief Judge, ALLEN and STEWART, Circuit Judges.

STEWART, Circuit Judge. The appellant was tried and convicted under two counts of an information charging violation of the narcotics laws. 26 U. S. C. A., § 4704; 26 U. S. C. A., § 7237. One count charged the appellant with the unlawful purchase of a quantity of heroin on May 17, 1954; the other charged the unlawful sale of the same heroin on the same date. Upon conviction the appellant was sentenced to a five-year prison term on each count, the sentences to run consecutively.

More than two years later the appellant filed in the sentencing court a motion to vacate or correct sentence under the provisions of 28 U. S. C. A., § 2255. The grounds for the motion were two: that the appellant had not been protected in his Constitutional right of being proceeded against by indictment rather than information, and that the consecutive five-year sentences, amounting to double punishment for the same offense, violated the appellant's Fifth Amendment rights. This appeal is

from the district court's denial of the motion, upon findings of fact and conclusions of law.

We deal at the outset with the appellant's contention that the district court should have conducted a hearing on the motion. While one of the grounds for the motion raised a factual issue, it was an issue that was readily determinable by reference to the files and records in the [fol. 55] district court, particularly the transcript of the arraignment. The appellant's other claim presented a question of law alone. No hearing was necessary under these circumstances. *United States* v. *Hayman*, 342 U. S. 205 (1952); cf. *Zavada* v. *United States*, —— U. S. —— (January 20, 1958).

Upon the first branch of the motion the district court's order was correct. The record affirmatively shows that the appellant was represented at the arraignment by counsel of his own choosing, who advised the district judge in open court that indictment had been waived. Rule 7(b), F. R. Crim. P. The original written waiver, signed by the appellant while represented by counsel, is part of the record on this appeal.

Upon the second branch of the motion it was the appellant's claim that the evidence at his trial showed only that he had sold the narcotics in question to a government agent, and that his conviction on the purchasing count was based solely on his possession of the same narcotics which he was convicted of selling. His contention was that under these circumstances two separate consecutive five-year sentences violated his Constitutional right and also exceeded the then statutory five year maximum sentence for first offenders under the Boggs Act, 26 U. S. C. A., § 7237 (1955 ed.). He therefore asked that one of the five-year sentences be set aside.

In denying this branch of the motion the district court did no more than follow an unbroken line of judicial authority. *Blockburger* v. *United States*, 254 U. S. 299 (1932); *Long* v. *United States*, 235 F. (2d) 183 (6 Cir., 1956); *McDade* v. *United States*, 206 F. (2d) 494 (6 Cir., 1953); *Gore* v. *United States*, 244 F. (2d) 763 (D. C. Cir., 1957); *Harris* v. *United States*, 248 F. (2d) 196, 200 (8 Cir., 1957); *United States* v. *Brisbane*, 239 F. (2d) 859 (3 Cir., 1956); *United States* v. *Johnson*, 235 F. (2d) 159

(7 Cir., 1956); *United States* v. *Lewis*, 227 F. (2d) 524 (2 Cir., 1955).

Under the weight of these and many similar precedents, there is no choice but to affirm the district court's order. In doing so, however, we note Judge Bazelon's concurring opinion in *Gore* v. *United States*, *supra*, 244 F. (2d), at 766: "If we were approaching afresh the question whether, in such a case, single or cumulative punishment is the legal course, I think we could not so easily conclude that the consecutive sentences here imposed are authorized. 'It would be self-deceptive to claim that only one answer is possible to our problem.' . . . But the question is not one we are at liberty to approach afresh."

[fol. 56] As there suggested, it may be that the "same evidence" test, applicable to narcotics offenses under the rule of the *Blockburger* case, will someday be re-examined by the Supreme Court in the light of its decisions applying the "same transaction" test to other criminal statutes. *Bell* v. *United States*, 349 U. S. 81 (1955); *Prince* v. *United States*, 352 U. S. 322 (1957); *United States* v. *Universal Corp.*, 344 U. S. 218 (1952). But that day has not yet come.

The order of the district court is affirmed.

[fol. 57] . . . .

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13,307

ERNEST DOSSY YANCY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Before SIMONS, Chief Judge, ALLEN and STEWART, Circuit Judges.

JUDGMENT—February 28, 1958

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Michigan, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ Potter Stewart
United States Circuit Judge

(File Endorsement Omitted)

[fol. 58] MANDATE—March 26, 1958

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Eastern District of Michigan—GREETING:

WHEREAS, lately in the United States District Court for the Eastern District of Michigan, before you or some of you, in a cause between United States of America, Plaintiff, and Ernest Dossy Yancy, Defendant, (D. C. No. 34315 Criminal), an order was entered on the 14th day of December, 1956, overruling defendant's motion to correct sentence;

AND WHEREAS, the said Ernest Dossy Yancy appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Sixth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord, one thousand nine hundred and fifty-seven, the said cause came on to be heard before the said United States Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby affirmed.

[fol. 59] YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS the Honorable EARL WARREN, Chief Justice of the United States, the twenty-sixth day of March in the year of our Lord one thousand nine hundred and fifty-eight.

/s/ Carl W. Reuss
Clerk,
United States Court of Appeals
For The Sixth Circuit

[fol. 60] SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1957

ERNEST DOSSY YANCY, PETITIONER

v.

UNITED STATES OF AMERICA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—May 26, 1958

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 27, 1958.

/s/ Harold H. Burton
Associate Justice of the
Supreme Court of the
United States.

Dated this 26th day of May, 1958.

[fol. 61] SUPREME COURT OF THE UNITED STATES

No. 64 Misc., October Term, 1958

ERNEST DOSSY YANCY, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—March 23, 1959

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 792.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

March 23, 1959

MR. JUSTICE STEWART took no part in the consideration or decision of these applications.

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